No. 463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT

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OCTOBER TERM, 1948

J. S. WOODS,
Petitioner,

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT

The question at issue in this case is whether or not an unqualified foreign corporation which cannot maintain a suit on a contract in the courts of the State of Mississippi may still maintain such suit in the courts of the United States.

STATEMENT OF FACTS

Respondent was the complainant in the District Court. It alleged, among other things, that Petitioner, who was the defendant there, was indebted to it for a real estate

commission in the sum of $3,450.00, with interest, growing out of the sale of certain lands belonging to Petitioner. It further alleged that Petitioner had employed Respondent as its agent for the purpose of making said sale, that Respondent was the procuring cause of the sale, having developed a purchaser for the property through its efforts, but that when the contract of sale was submitted to Petitioner he declined to enter into the deal. Nevertheless, seven days after the expiration of Respondent's agency contract, Petitioner entered into a contract with the same purchaser for the property at the same price except that one-half of the commission was deducted from the revised price.

Upon the filing of the suit, defense was made on the ground that Respondent was a foreign corporation, that it had not qualified to do business in Mississippi, and that the matters involved in the suit constituted the doing of intra-state business, and defendant asked that the suit be dismissed, raising the issues which are in controversy in the present phase of the proceeding.

Dismissal of Respondent's suit and the subsequent course of events through the District Court and the Circuit Court of Appeals are adequately set forth in Petitioner's brief.

RESPONDENT'S CONTENTIONS

The contentions of the Respondent are:

1. That the contract involved in this case is not void but merely unenforceable in the state courts of Mississippi.

2. That the doctrine set out in the cases of *Angel v. Bullington*, (1947), 330 *U. S.* 183, 91 *L. ed.* 832, *and Guar-*

anty Trust Co. v. York, (1945), 326 *U. S.* 99, 65 *Sup. Ct.* 1464, 89 *L. ed.* 2079, 160 *A. L. R.* 1231, does not apply to the case at bar.

3. Even if the statutes involved in this case are held to establish the public policy of the State of Mississippi and that policy is as broad as petitioner contends, nevertheless such statutes are penal statutes and will not be enforced by the courts of another sovereignty.

ARGUMENT

I

The contention of Respondent is that the contract involved in this case is not void but merely unenforceable in the state courts of Mississippi.

The case for Petitioner is based upon the theory that to enforce a contract such as the one involved in the case at bar would be contrary to the public policy of the State of Mississippi as reflected in its statutes and in the decisions of its Supreme Court. This is the very basis of the argument of Petitioner. Therefore if such basis is not true then his whole argument fails.

The statutes involved are as set out in the brief for Petitioner and are there correctly set out.

None of these statutes make void the making or performance of a contract such as the one involved here.

Therefore we must turn to the decisions of the Supreme Court of Mississippi. What is now Section 5339 of the Mississippi Code of 1942 is identical with Section 915 of the Code of 1906. This section provides merely for

the domestication of foreign corporations and for nothing else.

What is now Section 5343 of the Mississippi Code of 1942 is identical with section 935 of the Code of 1906. This section provides for filing with the Secretary of State by such foreign corporation of its charter or certificate of incorporation and provides a fine of $100 for failure to do so.

What is now Section 5344 of the Mississippi Code of 1942 is identical with Section 914 of the Code of 1906. This section provides for suits by and against foreign corporations and concludes with the phrase: "But such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

What is now Section 5319 of the Mississippi Code of 1942 was chapter 90 of Laws of 1928. All of these statutes are in the Code chapter on corporations and all must be read together. In reality, the only two statutes applicable here are Section 5319 and Section 5344.

In 1914 the Supreme Court of Mississippi decided the case of *Quartette Music Company v. Haygood*, (1914), 108 *Miss.* 755, 67 *So.* 211.

We were at first under the impression that this case did not hold void such contracts as the contract involved here. We are now of the opinion that we were mistaken as to this, and that the decision in the case last cited did hold void the contract involved in that suit and that, if the doctrine of the case last cited now applied, the con-

tract involved in this case would be void and could not be enforced in any court. This is because we think the case of Quartette Music Co. v. Haygood supra, stated what was conceived by the Supreme Court of Mississippi to be the public policy of Mississippi *at that time*.

At the time of this decision it must be borne in mind that sections identical with Sections 5339, 5343, and 5344 were in effect but that what is now Section 5319 of the Mississippi Code was not in effect. No statute like it was then in effect.

In 1928, fourteen years after the decision in Quartette Music Co. v. Haygood, supra, the legislature of Mississippi enacted what is now Section 5319 of the Mississippi Code of 1942. That section contains as its last sentence these words: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

Now we contend that neither the making nor the performance of such a contract as the one involved here is void under any statute of the State of Mississippi nor under the decisions of the Supreme Court of Mississippi as they now stand. It will be noted that no statute of the State of Mississippi is cited which states that such contracts are void. There is no such statute.

Since the statutes do not make such contracts void, it remains to look at the decisions.

As we have said, we think that the case of Quartette Music Co. v. Haygood, supra, held such contracts to be void but, as stated above, fourteen years after that de-

cision the legislature of Mississippi enacted Section 5319 of the Code of 1942, which section includes the sentence above quoted. Now if the legislature of Mississippi intended contracts made in Mississippi by unqualified foreign corporations to be completely void, and thus unenforceable in any court of any sovereignty, all it had to do was to let stand the decision in Quartette Music Co. v. Haygood, supra. Plainly, the legislature did not so intend but enacted the last sentence of Section 5319 of the Mississippi Code of 1942 specifically to show that such contracts were not void. Otherwise there was no reason for the inclusion of the sentence above noted.

We say no other reason can be given for such enactment. This is the very nub of this case.

Counsel for Petitioner cites many cases and we shall examine some of them now. It is well to note here that Counsel for Petitioner first said that the decisions of the Supreme Court of Mississippi had held to be void contracts such as the one involved here. They now say that the decisions of the Supreme Court of Mississippi are in confusion. This is what we have said all along.

In *Peterman Construction Company v. Blumenfield*, (1930), 156 *Mississippi* 55, 125 *So.*, 548, it was held that such contracts "could not be enforced in the courts of this state" and there was used the language "voidable transaction;" in *Wiley Electric Co. v. Jackson Electric Storage Battery Co.* (1933) 167 *Miss.* 842, 147 *So.* 773, it was held that the applicable statute "closed the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions;" in *Marx & Bensdorf v. First Joint Stock Land Bank*, (1937), 178 *Miss.* 345, 173 *So.* 297, it was held that the

statutes provided that such non-complying foreign corporation "is barred from bringing and maintaining any suit in the courts of this state;" in the case of *Case v. Mills Novelty Co.* (1940), 187 *Miss.* 673, 193 *So.* 625, it was held that such contracts are "unenforceable;" in *Newell Contracting Co. v. State Highway Commission*, (1943) 195 *Miss.* 395, 15 *So. 2d* 700, it was held that such contracts are "void and unenforceable."

Certainly, here is confusion. A contract may be void and, of course, it will then be unenforceable; on the other hand, it may be unenforceable and not void at all. We do not understand that Counsel for Petitioner now contend that contracts such as the one involved here are void, but they do contend that for the federal courts to enforce such contracts as the one involved here would violate the public policy of Mississippi. Now we say if the making or performance of such contracts as the one involved here is contrary to the public policy of the State of Mississippi, then they must be void. If they are void they are completely void, void even in their very inception. They can't be void sometimes and not be void at other times. To say they are void means they are nothing.

That they are not utterly void is shown by the fact that promissory notes growing out of such transactions are valid and enforceable, even in the state courts, in the hands of innocent purchasers for value. If they were void ab initio, this could not be true.

We commented on this in our reply brief in the Court of Appeals, citing Professor Williston's comment in his work on Contracts, Vol. VI, page 5029, Sec. 1772:

"A holder in due course of a negotiable note originally given to such a corporation as part of its unauthorized

business within the state has almost universally been allowed to recover."

This comment is made in a discussion of cases where such note is held not to be void, and it is stated that "an action may be maintained on it either in the courts of another state or in the federal courts if jurisdiction can be obtained."

In the case of *Lauter v. Jarvis-Conklin Mortgage Trust Co.*, (C.C.A.6) 85 *Fed.* 694, Mr. Justice Lurton said:

"The general and well-settled rule in favor of negotiable paper is that an innocent purchaser for value before maturity is unaffected by the fact that the consideration was illegal, and the note void and unenforceable in the hands of one having notice of the facts. If the illegality of the consideration results from a statute merely prohibiting a business, or imposing a penalty, but does not declare a note or bill based upon such a prohibited transaction absolutely null and void, a bona fide holder of such paper will be protected."

In *Fritts v. Palmer*, 132 *U.S.* 282, 33 *L. Ed.* 317, 10 *S. Ct.* 93, the Court distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state imposing conditions upon it prerequisite to the lawful transaction of business in such state. A tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from holding land in Colorado until it should acquire the right to do business therein

by complying with certain prescribed conditions. The only penalty which that statute provided was that the officers, agents and stockholders of such unqualified corporation should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held that the fair implication was that in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute, and therefore the courts ought not to inflict the additional, harsh penalty of forfeiting the estate conveyed to the Missouri corporation. It thus refused to treat the conveyance as void, although it had been made to a corporation forbidden to receive it.

In the same connection, we may cite *Bradford v. Indiana Harbor Belt Railroad Co.* (C.C.A. 7) 16 *Fed.* (2d) 836, *and Industrial Finance Corporation v. Community Finance Co., et al* (C.C.A. 5) 294 *Fed.* 870.

Fletcher on Corporations (Permanent Edition) Vol. 17, Sec. 8537, states the general rule in these cases as follows:

> "Where the statutes declare contracts of non-complying corporations wholly void, they are void in the Federal courts also, and the same rule applies generally where the state courts have construed contracts as void for non-compliance, but in the absence of such express statutory declaration or settled rule of judicial construction to that effect, the federal courts regard them as valid and enforceable in such courts; a statutory bar against suit by non-complying foreign corporations in the courts of the state has no application to the federal courts."

Fletcher in the same section at page 668 further says:

> ". . . Where the state authorities are in conflict and the state law seems to remain unsettled on the

subject, the federal courts may refuse to follow those (decisions) declaring contracts made without compliance with the statutes (to be) void, *where the statute does not expressly so provide.*" (Italics ours)

Fletcher further says that "the phrase 'in any court of this state (does) not embrace federal courts'." The above statement is made under the section cited above at page 672, and under note 93 he cites a number of cases in support of same.

It has also been held by this court as well as some of the state courts that where a federal statute gives an aggrieved party a right to a penalty without specifying a remedy for its enforcement, it may be enforced by an action in a state court, *unless the federal statute confines its enforcement to the federal courts. Claflin v. Houseman,* 93 *U.S.* 130, 137, 23 *L. Ed.* 838; *Penn.-Dixie Cement Corporation v. H. Wales Lines Co.,* 119 *Conn.* 603, 178 *Atl.* 659; *Eggling v. Lombardo,* 181 *Misc.* 108, 43 *N. Y. Supp. 2d* 358. The converse must also be true. That is to say, if a state penal statute expressly confines its enforcement to the state courts, it would seem obvious that the federal courts cannot enforce it. That is precisely the case here. *The state statute specifically provides for exclusion from the state courts alone.*

Furthermore, the Supreme Court of Mississippi has frequently shown, since 1928 which is the date of the enactment of Section 5319, that they do not consider such contracts void. See the cases of *Long Beach Canning Co. v. Clark,* (1925), 141 *Miss.* 177, 186, 106 *So.* 646, *and Citizens' Bank of Hattiesburg v. Grigsby,* (1934), 170 *Miss.* 655, 155 *So.* 684, 685.

Now, certainly, it cannot be said that there is anything in the statutes of Mississippi or in the decisions of the Supreme Court of Mississippi since 1928, the date of enactment of Section 5319, that makes void such contracts as the one involved here.

When we come to the question of public policy, where is the statute that says a contract such as the one involved here is contrary to the public policy of the State of Mississippi? Section 5319 certainly does not say so. It merely says that we cannot bring or maintain any suit on this contract in the state courts of Mississippi. If the legislature of Mississippi had wanted such contracts to be considered against the laws or public policy of Mississippi then the legislature had only to say so. Actually, the legislature had only to let the decision alone in Quartette Music Co. v. Haygood, supra, and such contracts would have continued to be held void, void in their very making or performance, like Sunday contracts, gambling contracts, or contracts involving the sale of intoxicating liquor. There would have been no question then but what the making or performance of such a contract as this was against the public policy of Mississippi, but the legislature did not even do this. In 1928, fourteen years after the decision in Quartette Music Co. v. Haygood, supra, the legislature enacted Section 5319 of the Code of 1942, which section specifically said that such non-complying corporations could not bring or maintain any suit in the courts of Mississippi on such a contract made by a non-complying corporation in the State of Mississippi. If the legislature intended that such contracts should be against the public policy of Mississippi, why did the legislature enact the last sentence of Section 5319? It did not have to do so. We say that the enactment of the last

sentence of Section 5319 was plainly for the purpose of showing that such contracts as the one involved here were not against the public policy of the State of Mississippi as they were held to be by the Supreme Court of Mississippi in Quartette Music Company v. Haygood, supra, fourteen years earlier, but that it was simply the public policy of Mississippi that such non-complying foreign corporation should not bring or maintain any suit on such contract in the state courts of Mississippi. Otherwise there was no reason for the enactment of this last sentence of Section 5319. Certainly, this last sentence nullifies the decision of the Supreme Court of Mississippi in Quartette Music Co. v. Haygood, supra, to the extent that that case held void such contracts as the one involved here.

Section 5339 of the Code of 1942 does not say that such contracts are against the public policy of Mississippi. It provides merely for the domestication of foreign corporations and for nothing else.

Section 5343 of the Code of 1942 does not say that such contracts as the one at bar are against the public policy of Mississippi. It simply provides for the filing with the Secretary of State by such foreign corporation of its charter or certificate of incorporation, and provides a fine of $100 for failure to do so.

Section 5344 does not say that such contracts are against the public policy of Mississippi. If does say that such foreign corporations shall not be allowed to recover on any contract made in violation of the laws or public policy but it does not say anything about the making or performance of a contract like this being in violation of the laws or public policy of the state. Of course, such

foreign corporations could not make a valid Sunday contract; could not make a valid gambling contract; could not make a valid contract to sell whiskey in violation of the laws of Mississippi.

The vice in the argument of Counsel for Petitioner is the assumption that the last phrase in Section 5344 of the Code of 1942 makes contracts like the one involved here against the public policy of Mississippi. But this is merely an assumption and it is an assumption which has no basis because the legislature of Mississippi showed, by the enactment of Section 5319 of the Code of 1942, that the only thing that was against public policy of Mississippi was for such non-complying corporation to enforce such contract in the courts of Mississippi. Apparently, the Supreme Court of Mississipi in Quartette Music Co. v. Haygood, supra, thought that what is now Section 5344 (then Section 914 of the Code of 1906) did what Counsel for Petitioner says that Section 5344 does in this case. But the legislature of Mississippi by its enactment of Section 5319 made sure that Section 5344 would do no such thing. So the public policy of Mississippi is definitely not to make contracts like the one involved here void, but only to penalize the non-complying corporation by making it pay a fine and by preventing it from enforcing any such contract in any court of the State of Mississippi. Such, and such alone, is the only public policy of Mississippi on this question.

Nor is there any comfort for Petitioner when we turn to the later decisions of the Supreme Court of Mississippi. We have already referred to most of the applicable decisions, but we now call the special attention of the Court to the case of *State ex rel. Attorney-General v.*

Edward Hines Lumber Co. et al., (1914), 106 *Miss.* 780, 64 *So.* 729. In the first place, that case was also decided in 1914, fourteen years before the enactment of Section 5319 of the Code of 1942. Everything that has been said at bar with reference to the case of Quartette Music Co. v. Haygood, supra, applies to the case last cited. In the second place, the course of action involved in the Hines Lumber Company case was specifically made a violation of the public policy of Mississippi by Section 903 of the Mississippi Code of 1906. This is not true regarding the contract involved in this case. In the third place, to have allowed a foreign corporation to escape the application of Section 903 would have discriminated against domestic corporations of Mississippi. Such is not true in the case at bar because a citizen of Mississippi, or a domestic corporation of Mississippi, or even an individual citizen of another state could have enforced the contract involved here in the courts of Mississippi.

In other words, all the statutes involved in this case are simply designed for the purpose of revenue, simply intended to force any foreign corporation doing business in the state of Mississippi to put itself upon the same footing as a domestic corporation of Mississippi. That is all, and that is all that is shown by either the statutes of Mississippi or by the decisions of the Supreme Court of Mississippi since the enactment of Section 5319 of the Mississippi Code of 1942 in the year 1928. So the whole argument of Petitioner that to allow us to maintain this suit in the federal courts would nullify the public policy of Mississippi falls to the ground, for the reason that he has no basis anywhere for the assumption that for the federal courts to allow us to proceed with a suit on a contract of this kind would be against the public policy of

Mississippi. In other words, his basic premise simply does not exist.

II

The doctrine set out in the cases of Angel v. Bullington, supra, and Guaranty Trust Co. v. York, supra, does not apply to the case at bar.

What Counsel for Petitioner have to say about the cases of *Erie R. R. Co. v. Tompkins,* (1948), 304 *U. S.* 64, 82 *L. Ed.* 1188, 114 *A. L. R.* 1487, *Guaranty Trust Co. v. York,* (1945), 326 *U. S.* 99, 89 *L. Ed.* 2079, 160 *A. L. R.* 1231, *and Angel v. Bullington,* (1947), 330 *U. S.* 183, 91 *L. Ed.* 832, is all very interesting but has nothing to do with the issue involved here.

Those cases simply say that the federal courts will not permit recovery directly against the public policy of a state. No doubt that is true. Certainly, if it is true, then this Court will not refuse to let Respondent proceed with this suit when it is clear that the only public policy of Mississippi in a case like this is to refuse to allow a suit to be brought or maintained in the state courts. If this Court should do what Petitioner wants it to do, then this Court would be proceeding directly against the public policy of Mississippi because Section 5319 of the Code of 1942 shows what the legislature of Mississippi wanted the public policy of Mississippi to be. It wanted non-complying foreign corporations excluded from the state courts. Otherwise, there was no reason for the inclusion of the last sentence of Section 5319.

Certainly, the case of Angel v. Bullington, supra, cannot apply to this case. With all due deference to this Court, we think the real decision in Angel v. Bullington

was based, and rightly based, upon *res adjudicata*, and once we accept the decision of the North Carolina Court as res adjudicata, that would seem to end any further inquiry and to preclude the possibility of federal courts sitting in North Carolina or elsewhere deciding the case upon any other or different grounds.

However, if this is not true, still Angel v. Bullington, supra, cannot apply here for the reason that a contrary decision in Angel v. Bullington would have discriminated against the citizens of North Carolina and the domestic corporations of North Carolina and for the further reason that the North Carolina statutes plainly showed that the recovery of a deficiency judgment by any litigant, individual or corporate, foreign or domestic, resident or non-resident, was against the public policy of North Carolina.

To allow Respondent to proceed in this case would allow it to do only what a citizen of Mississippi could do or what a domestic corporation in Mississippi could do. The only possible discrimination that could be made by allowing it to proceed in this suit in the federal courts would be to favor it over non-complying foreign corporations whose demands would not exceed $3,000. That is all and the same thing happens all the time in effect, in various suits where the amount involved is less than $3,000. If such a slight discrimination as this is to be voided, then we shall just have to do away entirely with the diversity statutes. Of course, we would not attempt to argue that this Court should do something that would discriminate against a citizen of Mississippi or a domestic corporation of Mississippi.

We submit that it is obvious that to allow Respondent to proceed in the federal courts with this suit cannot possibly discriminate against any citizen of Mississippi, any domestic corporation of Mississippi, or even any non-resident individual.

In addition to this, the doctrine of Angel v. Bullington, supra, cannot apply in this case for the reason that it would nullify the doctrine laid down in the case of *Brace v. Gauger-Korsmo Construction Co.*, (1929, C.C.A. 8th), 36 *F. 2d* 661, (*Certiorari denied* 1930, 281 *U. S.* 738, 50 *Supt. Ct.* 333, 74 *L. Ed.* 1153).

Under the doctrine of the case last cited where the statutes of a state do not make contracts void such as the contract involved in the case at bar, and where the decisions of the highest court of the state are in conflict, still the non-complying foreign corporation can proceed in the federal court. Now this doctrine is entirely different from that laid down in the case of *David Lupton's Sons Co. v. Automobile Club of America*, (1911), 225 *U. S.* 489, 32 *S. Ct.* 711, 56 *L. Ed.* 1177.

The doctrine of Brace v. Gauger-Korsmo Construction Co., supra, exactly fits this case. The Mississippi statutes do not make contracts void such as the one involved here. The decisions of the Supreme Court of Mississippi since the enactment of Section 5319 of the Mississippi Code of 1942 are in confusion as Counsel for Petitioner admit. Therefore, under the doctrine of Brace v. Gauger-Korsmo Construction Co., supra, Respondent is still entitled, for this reason, to proceed with this suit in the federal courts, even though it could not proceed with it in the state courts of Mississippi.

Counsel for Petitioner say that the doctrine of Brace v. Gauger-Korsmo Construction Co., supra, was wiped out by the decision of this Court in Angel v. Bullington, supra, but nothing in the opinion in the latter case says so. This is a novel doctrine, a doctrine to the effect that the Supreme Court overrules a former decision, which decision sets up an entirely different doctrine, without even mentioning the decision or the doctrine overruled. We do not think it a sound doctrine, and we shall continue to think that the doctrine laid down in Brace v. Gauger-Korsmo Construction Co., supra, is still the law until this Court expressly overrules it.

III

Even if the statutes involved in this case are held to establish the public policy of the State of Mississippi, and if that public policy is as broad as Petitioner contends, which we deny, nevertheless such statutes are penal statutes and will not be enforced by the courts of another sovereignty.

The following definitions, taken from cases considering statutes regulating corporations and their officers, may be helpful at this point:

In Brown v. Kildea, Supreme Court of Washington, 108 *Pac.* 452, a suit by a stockholder against officers of a corporation for a statutory penalty, the court said, among other things:

> "The appellants contend that this statute is a penal one and should be strictly construed, whilst the respondent asserts that, insofar as it affects the case at bar, it is remedial and should receive a liberal interpretation. We think the appellants have

the correct view of the statute. Under the statute the officer who violates its provisions is deemed guilty of a misdemeanor, the penalty to the state being imprisonment in the county jail not more than one year, or by fine not exceeding $500, or by both such fine and imprisonment . . . and to the injured party a penalty of not less than $100 nor more than $1,000, and all damages which he sustains. We agree with the learned trial court that a statute may be penal in part and remedial in part. *The remedial part of this statute, however, is the provision for the recovery of actual damages. The penalty is not imposed as compensation, but as a part of the punishment of the offending officer. A statute which subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury, is a penal statute.*" (Italics ours)

In the above case, the court further pointed out that where an action is founded entirely upon a statute having for its object the recovery of a penalty or forfeiture, the statute is clearly penal; but that where it gives the injured party enhanced or double damages for a wrong suffered or a right violated, it is remedial. Of course, in the case at bar, the defendant had no right to make any requirement of a foreign corporation and no right to sue it for damages because of its failure to domesticate. He could only exact a penalty in an arbitrary amount—the amount of the contract sued on—if the foreign corporation sued for same in the state courts.

Another good definition of penal statutes is contained in *People v. Crucible Steel Co. of America*, 151 *Mich.* 718, 115 *N.W.* 705, where the court said:

"We understand a penal statute to be a statute imposing a penalty for doing that which the statute

prohibits or for omitting to do that which the statute requires, or, as is stated in 22 Am. & Eng. Encyclopedia of Law (2d Ed.) page 654, 'a penal statute is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited'."

We asserted in our prior brief that we felt that the federal courts would not undertake to enforce the penal statutes of a state. That, without question, appears to be the general rule of so-called private international law. There is one qualification of the rule. Whether a court will enforce a penal law of another sovereignty depends upon whether it is penal in the sense of punishing an offense against the public justice of the state, or whether its purpose is to afford a private remedy to a person injured by the wrongful act. In the first sense, it is a penal law, and is not enforceable in the courts of another sovereignty.

Huntington v. Attrill, 146 *U. S.* 657, 36 *L. Ed.* 1123, 13 *S. Ct.* 224.

Fletcher on Corporations, Volume 17, Section 8537 is authority for the proposition that a statute excluding a non-complying foreign corporation from the courts of the state is penal in nature. It is penal in the sense of preventing a public injustice and not in the sense of furnishing a remedy to some person who is aggrieved by a wrongful act. He quotes the following from one of the cases on the subject, which seems to us to state the rationale of the rule unusually well:

"It is a familiar principle that the federal courts do not follow the penal statutes imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a state cannot shut up the federal

courts, nor deny parties access thereto. They may prescribe rules of property and declare contracts within their jurisdiction null and void, and thereupon the federal courts will enforce the rules of property and refuse to enforce the void contracts; but if the legislature leaves the contract valid, enabling the parties to invoke it in jurisdictions that are not amenable to the legislature of Tennessee, I see no reason why the federal courts may not enforce such contracts although their enforcement is prohibited by the courts of the State . . . It does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves and non-enforceable in State courts only because they are not in conformity to certain rules and regulations of an administrative character necessary to be complied with before suit can be brought upon them in the State courts."

Eastern Buildings & Loan Assn. v. Bedford, D. C. Tenn. 88 *Fed.* 7.

The case of *State of Wisconsin v. Pelican Ins. Co.*, 127 *U. S.* 265, 8 *S. Ct.* 1370, 32 *L. Ed.* 239, has been cited in support of the view that this Court considers the states as sovereignties foreign to the Federal sovereignty when questions of private international law are involved. In that case, the State of Wisconsin, on a judgment obtained in one of its courts against a Louisiana corporation, brought suit in the United States Supreme Court. On the theory that Wisconsin was a foreign sovereignty in this sense, and that the suit was founded upon a penal statute, the court held that it would not entertain the suit to enforce that statute, saying (127 U. S. at page 289, 32 L. Ed. 239, 8 S. Ct. at page 1374):

"By the law of England and the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or

> statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts in another country."

That case has been cited subsequently by the Supreme Court of the United States and does not seem to have been overruled or qualified. Mr. Justice Gray, who wrote the opinion in Huntington v. Attrill, supra, referred to the holding in Wisconsin v. Pelican Ins. Co., saying (146 U. S. at page 672, 13 S. Ct. at page 229, 36 L. Ed. 1123):

> "Upon similar grounds, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States."

The effect of Wisconsin v. Pelican Insurance Co., supra, does not seem to us to be weakened by the recent case of *Testa v. Katt*, 330 *U.S.* 386, 91 *L. Ed.* 967, 67 *S. Ct.* 810, 172 *A. L. R.* 225, overruling a decision of the Supreme Court of Rhode Island, because that case bases its holding upon the supremacy clause, Article VI of the Constitution of the United States, in ruling that a state must enforce a penalty included in a statute of the United States. The effect of that decision, as we see it, is that the rule of private international law mentioned above must give way in the face of the supremacy clause of the Federal Constitution when Congress sees fit to enact a statute applicable in all states and containing penalty provisions. It can hardly follow where the question involved is whether a federal court will enforce a state penal statute that the question is foreclosed by Testa v. Katt, supra, because there is no federal constitutional question involved. In addition, it seems clear that there is a different type of statute involved in the Testa case

—a statute that gives treble damages, and is, therefore, under the definitions, remedial. There is, therefore, no reason why the established rule of private international law should not govern, and the law as announced in Wisconsin v. Pelican Insurance Co., supra, should apply to the case at bar.

It should be observed that the fact that the statute involved in the case at bar is penal in the sense of punishing an offense against the public justice of the state would seem to be recognized by petitioner in the insistence of his counsel upon the question of public policy. Petitioner would seem to be confronted by this dilemma, that if his contention about respondent's act being violative of the public policy of Mississippi is sound, the effect of the statutes invoked is punitive and penal in the strict sense. The test is the legislative intent and it is clear that such punishment was intended to be penal in the strict sense—to protect and preserve public justice. Therefore, petitioner is cast under either view. If public policy was not violated, the contract cannot be void. If it was violated, the punishment is penal and a Federal court will not enforce a state's penal statutes.

Thus, if it is determined that the statute involved is a penal statute; that it is penal in the sense of punishing an offense against the public justice of the State; and that, under established rules, the federal courts will not undertake to enforce penal statutes of the states, this proposition must be conclusive against Petitioner; and it must be held that Respondent is entitled to try its suit on the merits in the federal district court.

Whether statutes are penal in the primary sense cannot depend upon whether they are invoked by a public authority or a private litigant. In the multitude of legal situations that might arise under such statutes, that could hardly be a safe or logical test.

The true test is the intent of the legislature. Was the legislature trying to safeguard some phase of public justice and punish all who offended against its enactment; or was it merely trying to enlarge the remedy offered by the common law for persons injured by the wrongful acts of others?

In this case, it must be answered that the legislature was concerned with public justice. It was laying down a state-wide rule and providing penalties for its infraction.

It is one thing to say, under Erie v. Tompkins, supra, that Federal Courts must follow State statutes and decisions with respect to such matters as statutes of limitation, burden of proof, and contributory negligence; but it is quite another thing to say that State statutes and decisions may define what kinds of suits may be brought by litigants in Federal Courts sitting in such State.

The doctrine of Wisconsin v. Pelican Insurance Company, supra, and Huntington v. Attrill, supra, that where a statute is penal in the strict or primary sense it will not be enforced in the courts of another jurisdiction, but that it will be enforced if it is penal in the secondary sense of merely affording a remedy to some private in-

dividual who has been injured by a wrongful act, has been recognized by this Court in the following cases:

Yarbrough v. Yarbrough, 290 *U. S. at* 216, 78 *L. Ed. at* 278;

Broderick v. Rosner, 294 *U. S. at* 642, 79 *L Ed.* 1107;

Texas v. Donohue, 302 *U. S. at* 288, 82 *L. Ed. at* 266, 268;

Overnight Motor Transport Co. v. Missell, 316 *U. S. at* 583, 86 *L. Ed. at* 1691;

Magnolia Petroleum Co. v. Hunt, 320 *U. S. at* 438, 88 *L. Ed. at* 155. *See footnote No.* 4 *page* 155 *of*, 88 *L. Ed.*

Georgia v. Pennsylvania Railroad Co. 324 *U. S. at* 446, 89 *L. Ed. at* 1056.

The question was expressly pretermitted, apparently not being necessary to the decision, in *Milwaukee Co. v. White*, 296 *U. S.* 268, 88 *L. Ed.* 220 (*See* 228-229 *of* 88 *L. Ed.*).

For the same reason which prevented Testa v. Katt, supra, from weakening the effect of this doctrine when invoked in a case like the one at bar, we submit that the case of *Sherrer v. Sherrer*, 334 *U. S.* 353, 92 *L. Ed.* 1062, does not result in eliminating either the doctrine or the cases cited. That reason is that in Sherrer v. Sherrer, supra, the point involved was one relating to res adjudicata and the full faith and credit clause of the Constitution of the United States. Neither question is involved here, and we strongly urge that the authority of Wisconsin v. Pelican Insurance Co., supra, and Huntington v. Attrill, supra, insofar as they lay down the rule with respect to the courts of one sovereignty not enforcing

the penal statutes of another sovereignty in the primary sense, is unimpaired and applicable here.

If a federal court should feel constrained, notwithstanding the authorities cited above, to apply the doctrine of Erie v. Tompkins, supra, in a case like that at bar, it would still be compelled, under the very doctrine of Erie v. Tompkins, to ascertain what the Supreme Court of Mississippi has determined to be the law of Mississippi with respect to this rule about penal statutes. The discovery would then be made that the State of Mississippi itself has recognized the rule, which has been cited with approval in the following cases:

Bank of Hickory v. May, Sheriff et al 119 *Miss.* 241, 80 *So.* 704.

W. T. Rawleigh Co. v. Hester, 190 *Miss.* 329, 200 *So.* 250 (*See headnote* 4).

Thus one seems to find oneself confronted with the long-established rule of private international law which provides that a Federal district court in Mississippi should not enforce a law of the State of Mississippi which is penal in the primary sense; and, at the same time, if a federal district court should feel itself constrained by the doctrine of Erie v. Tompkins, supra, to look to the law of Mississippi for the rule of decision in the case, it would find that the State of Mississippi by its highest court has approved that same rule of private international law. We can, therefore, see no escape from the conclusion that the Mississippi statutes invoked by Petitioner cannot constitute a bar to Respondent's being permitted to try its suit on the merits in the federal district court in Mississippi.

One question seems to remain. Are we correct in asserting that the statutes of Mississippi which have been invoked here are penal in the strict or primary sense of punishing a violation of public justice and are not merely to afford a remedy for the protection of private individual rights? We cannot conceive that the State of Mississippi enacted these statutes simply to afford individual defendants a defense in cases of this kind. It seems obvious that the legislative purpose was to require all foreign corporations doing business in Mississippi to submit themselves to the laws of the State and that the penalties contained in these statutes are designed as punishment for any foreign corporation failing to comply with their requirements. This is a punishment to satisfy public justice. We have already cited Fletcher on Corporations to the effect that statutes like these are penal in the strict or primary sense. Another consequence of that fact is that they will be strictly construed against the litigant invoking them and in favor of the litigant against whom they are invoked. Therefore, we feel that we are entitled to urge that these statutes be not extended beyond their plain language. That language could not be more explicit. It provides that offending foreign corporations shall not maintain suits on their contracts in the state courts. To extend that prohibition to the federal courts by interpretation would, we think, violate the fundamental rules of statutory construction with respect to penal statutes.

That these and analogous statutes are regarded as penal in the strict sense, and that they must be strictly construed in favor of the litigant against whom they are invoked, is, we think, shown by the following authorities:

Bank of Hickory v. May, supra.

W. T. Rawleigh Co., Inc. v. Hester, supra.
People v. Crucible Steel Co. of America, supra.
Brown v. Kildea, supra.
Alexander Film Co. v. State, 201 *Ark.* 1052, 147 *S. W. 2d*, 1011.
Murray Tool & Supply Co. v. State, 203 *Ark.* 874, 159 *S.W. 2d*, 71.

THE OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals is in the record. (R.P. 81). It is also reproduced in Petitioner's brief. It contains a penetrating analysis of the decisions of the Supreme Court of Mississippi. It is particularly clear in the reasons given by the court for concluding that where the Supreme Court of Mississippi occasionally used the word "void," it did not mean absolutely null, but only void in the sense of being unenforceable in the State courts. (R.P. 85-86).

The quotation by the Court of Appeals from Peterman Construction and Supply Company v. Blumenfeld, supra, at the top of page 86, is particularly striking. The Court of Appeals quotes from that case language of the Mississippi Supreme Court to the effect that under Quartette Music Co., v. Haygood, supra, such contracts *cannot be enforced in the State courts.* And immediately following that quotation the Supreme Court of Mississippi says, "*that* is the policy of this state . . ." In other words, the public policy of the state is not that such contracts shall be absolutely null and void. The public policy of the state is only that they shall not be enforced in the State courts. Of course, that has been Respondent's contention since the beginning of this controversy.

As a further reason for its conclusion, the Court of Appeals makes this very significant comment about the

latest Mississippi case, the Newell case (Newell Contracting Co. v. State Highway Commission, supra):

> "We think the cases cited in the Newell Contracting Co. case, with the exception of the Haygood case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. v. Clark, 1926, 141 Miss. 177, 106 So. 646, and Citizens' Bank of Hattiesburg v. Grigsby, 1934, 170 Miss. 655, 155 So. 684 . . ."
>
> "When, therefore, the court in the Newell case used the words 'void and unenforceable' we must interpret 'void' as meaning that no relief could be granted to a non-complying foreign corporation in view of the statute. Suppose a Mississippi resident had sued a non-resident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the non-resident corporation could set up that since it had not qualified to do business in the State of Mississippi, the contract entered into was void? We think not. The Mississippi statutes deny to the non-complying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contract in the State courts."

PETITIONER'S BRIEF

The line of cleavage between our views and those of Petitioner's counsel is clear from a consideration of the respective briefs as a whole. However, there are a few points in Petitioner's latest brief to which we would like to refer specifically.

Petitioner places much emphasis on Sec. 5344 of the Mississippi Code, but that section obviously is intended to provide that agents of foreign corporations shall be able to act with the same force and validity as agents of private persons; and the statement that such corporations shall not commit any act in violation of the law or policy of the state looks forward to a time when they have qualified and are doing business. That is to say, it was intended to place them under the same prohibition as to Sunday contracts, wagering contracts, and similar regulated or prohibited matters as residents of the State, individual or corporate. This section definitely does not say that failure to qualify violates the policy of the state. As we have elsewhere insisted, the policy of the state cannot go any further than to exclude offending foreign corporations from the state courts.

Moreover, whether Petitioner feels that his argument falls under the Judiciary Act or under the doctrine of Erie v. Tompkins, supra, he is confronted with the same ultimate barrier to his position as that stated above, that is to say, that the law of Mississippi provides for nothing beyond exclusion of Respondent from the state courts.

Petitioner further quotes from the opinion of this Court in Guaranty Trust Company v. York, supra, to the effect that—

> "The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the states. *Whenever that law is authoritatively declared by a state . . . such law ought to govern in litigation founded on that law, whether the forum of application is a state or a federal court . . .*" (Italics ours)

To that quotation, we feel that no one can take any exception. We say further that it supports Respondent's contentions rather than Petitioner's, for the following reasons: (1) this litigation *is not founded* on the Mississippi statutes elsewhere cited by Petitioner; (2) the statutes in question do not create substantive rights but provide penalties; and (3) even assuming that the quotation is otherwise applicable to our situation, the law of Mississippi has been authoritatively declared against Petitioner's contentions and in favor of ours, in that that law authoritatively declares that the state shall exact, in addition to fines, only the exclusion of offending foreign corporations from the state courts. There has certainly been no authoritative declaration by the law of Mississippi that contracts like the one in suit are void or that suits on them may not be maintained in federal courts.

In the last paragraph of their Point I, Petitioner's counsel say that Section 5344 of the Mississippi Code is all-embracing and that a contract entered into in violation of the laws of the state is unenforceable in any court. We repeat that a careful reading of that section will show that that is much too broad a statement of its provisions.

Again in their heading under Point II, Petitioner's counsel say:

> "The contracts sued upon are unenforceable in the federal court whether the contracts are absolutely void or merely unenforceable because of the failure of the respondent to qualify to do business in the state."

If they had stated the effect of the words of the statutes themselves—unenforceable in the courts of this state—their Point II would fall of its own weight. Their ar-

gument would be negatived in its very statement.

Elsewhere, Petitioner's counsel say:

> "Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the Respondent might have recovered upon the contracts in question in the state court. It being conceded that no such recovery could be had, it is immaterial whether the contracts are absolutely void or merely unenforceable."

That is certainly assuming the very thing we are trying to determine, and we submit it is begging the very question in issue.

Petitioner's counsel have gone to considerable pains to argue extensively, and quote from, the case of *John Hancock Mutual Life Insurance Co. v. Yates*, 299 *U.S.* 178, 81 *L. Ed.* 106; but it seems to us that that whole case can be very simply explained on the ground that the court applied the lex loci contractus.

Petitioner's counsel also say that we have not at any point denied that for purposes of diversity jurisdiction, federal courts are merely other courts of the state. We realize that the courts have often used that phraseology, and in many cases it gives an accurate picture of the situation. However, we have been under the impression that everything in our several briefs, including this one, is rather pointedly directed to the denial of that thesis under the situation here presented, and that to adopt such a view here would be a gross distortion of the realities involved.

In their reply brief to our brief on the application for certiorari in this case, Petitioner's counsel also asserted.

at page 8, that the statutes involved here are substantive, and that we have not contended in any brief that they are merely procedural. We think we have vigorously contended that they are not substantive. If we have not, we do so now. But even if it be admitted—for the sake of argument only for we make no such admission in reality—that they are substantive and even that they declare the public policy of Mississippi, we say further that they are penal in the strict sense and will not be enforced in the courts of another sovereignty.

CONCLUSION.

In conclusion, we say that the Court of Appeals has decided this case correctly and that its judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE

I certify that I have this day served notice of the filing of respondent's brief on the hearing of this cause in the Supreme Court of the United States, together with a copy of the brief, upon William H. Watkins, Esq., Jackson, Mississippi, James McClure, Esq., and J. W. Kyle, Esq., Sardis, Mississippi, counsel for the petitioner herein, by mailing same to each of them at their offices.

Dated at Memphis, Tennessee this 19 day of March, 1949.

John A. Osmach

Of Counsel for Interstate Realty Company, Respondent